January 23, 2004

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
Room 10276
451 Seventh Street SW
Washington, DC 20410-0500

RE: America's Affordable Communities Initiative: HUD's Initiative on Removal of Regulatory Barriers: Identification of HUD Regulations That Present Barriers to Affordable Housing [Docket No. FR-4890-N-01]

Dear Sir or Madam:

The American Association of Homes and Services for the Aging (AAHSA), the National Affordable Housing Management Association (NAHMA), the National Apartment Association (NAA), the National Leased Housing Association (NLHA), and the National Multi Housing Council (NMHC), appreciate the opportunity to identify and comment on regulations issued by the Department of Housing and Urban Development (HUD) which present barriers to affordable housing.

We commend the Department for examining federal, state and local regulatory barriers to affordable housing. This regulatory review presents an important opportunity for owners and management agents who operate affordable multifamily housing to offer a stakeholder perspective on the federal regulations currently under review.

The Department's notice invites the public to identify HUD regulations and implementation of statutory requirements which present barriers to production and rehabilitation of affordable housing. Also, the notice states HUD's intention, "to target those regulations that raise costs substantially or significantly impede the development or rehabilitation of America's stock of affordable housing."

We have identified several issues related to implementation of HUD regulations which adversely affect development, rehabilitation, and availability of affordable housing. Our comments will discuss barriers to development and rehabilitation of Supportive Housing for the Elderly and Persons with Disabilities. In addition to barriers which prevent "bricks and mortar" construction and rehabilitation, we also respectfully request that the Department consider several management-related issues which could promote greater participation in the Section 8 voucher program by private-sector owners and agents, and thus, increase the availability of housing choices for low-income families. Finally, we will raise concerns about the potential barrier to participation in HUD programs posed by HUD's recent guidance on the "Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons (Notice)" [*Federal Register*

Docket No. FR-4878-N-01]. We respectfully submit the following information for the Department's consideration.

<u>Barriers to Production and Rehabilitation of Section 202 and Section 811 Housing</u>

- **Development Cost Limits for the Supportive Housing for the Elderly and Persons with Disabilities Programs (24 CFR 891.140)**

The regulation cited requires HUD to "…use the development cost limits, established by Notice in the *Federal Register* and adjusted by locality, to calculate the fund reservation amount of the capital advance to be made available to individual Owners…" We believe closer examination of HUD's implementation of this regulation is warranted to ensure the limit is sufficient to cover the development costs in each region. Insufficient development cost limits act as a barrier to affordable housing production by causing delays in the processing phase of the programs, which prevents sponsors from beginning the actual construction of these projects.

Many owners and operators of Section 202 and Section 811 housing have noted that per unit development awards for 202 and 811 projects are too low in some parts of the country. One owner/agent, who was developing Section 202 housing in the North East related, "We found that the entry level cost for a one bed room unit was in excess of $100,000, far below the $72,000 per unit award for that year."

When developers do not have enough money in their award, they must exhaust other funding source options before seeking additional funds from HUD. This requirement has been a major obstacle for Section 202 sponsors trying to move from the processing to the construction phase of development. Sponsors must devote considerable time to applying for funds from CDBG, HOME, state/local housing trust funds, and other programs. Then, because these programs run on their own funding cycles, sponsors must wait to learn whether their application has been approved. The effect of having insufficient per unit development cost allowances is that the Section 202 program must often operate as a multilayered subsidy program, particularly in the North East.

We urge HUD to ensure that per unit development costs are reflective of the true costs of development in each region of the country. We believe setting higher development cost awards when warranted would expedite processing and eliminate the delays associated with the search for supplemental funding. Moreover, we encourage the Department to develop a streamlined, expedited process for sponsors to receive additional Section 202 funding when other sources are not available. Adoption of these recommendations would decrease the processing time for awards, enable project sponsors to begin construction more quickly, and ultimately allow these units to be brought into service more quickly for very low income families.

- **Operating Cost Standards for the Supportive Housing for the Elderly and Persons with Disabilities Programs (24 CFR 891.150)**

The regulation cited requires,

> "HUD shall establish operating cost standards based on the average annual operating cost of comparable housing for the elderly or for persons with disabilities in each field office, and shall adjust the standard annually based on appropriate indices of increases in housing costs such as the Consumer Price Index. The operating cost standards shall be developed based on the number of units. However, under the Section 811 Program and for projects funded under Secs. 891.655 through 891.790, the operating cost standard for group homes shall be based on the number of residents. HUD may adjust the operating cost standard applicable to an approved project to reflect such factors as differences in costs based on location within the field office jurisdiction. The operating cost standard will be used to determine the amount of the project assistance initially reserved for a project."

We urge the Department to examine the implementation of this regulation. There have been numerous reports from owners and agents who operate Section 202 properties that the operating cost standards are insufficient in certain high-cost areas. These operators strongly believe insufficient operating cost standards represent a barrier to affordable housing production--especially for small, faith-based non-profit sponsors that do not have the resources to invest large additional sums of money into the property. Once the project is constructed, rents must be set at an appropriate level for the projects to be financially sound and able to serve very low income families.

Generally speaking, the initial Operating Cost factor is locked at the time the project is approved, and it is not escalated for inflation during the development period. Since these projects are generally taking three years to complete, this means some projects are starting operations seriously under funded. Costs lag behind the actual timeline for processing and construction. Generally speaking, sponsors submit applications in June, awards are announced in November or December, and when all goes well, construction can begin in 18 months. The PRAC is based on cost assumptions that may already be outdated in that region before construction begins. As one example, a Section 202 property opening in 2004 received a 2002 funding award. The rents for this property were set on 2002 costs.

Sponsors must use their minimum capital investments (MCIs) before HUD will provide a rent increase. Losing the MCI due to inadequate rents presents a hardship for small non-profits and is a disincentive to participate in the program.

We believe this barrier could be overcome if the Department were to provide additional flexibility when there is a documented and substantiated need for a higher operating cost standard.

- **Requiring Underwriting on 202 Refinancing at the Lesser of Section 8 or Market Rents (24 CFR 891.530, Section 811 of P.L. 106-569, Section 612(h) of P.L. 107-116, Notice H 2002-16 (HUD))**

Notice H 2002-16 (HUD) provides guidance on prepayment and refinancing of Section 202 Direct Loans projects and Section 202 Direct Loans with project-based Section 8 Rental Assistance. The notice also includes underwriting guidelines for using FHA mortgage insurance to refinance the Section 202 Direct Loan. We believe these underwriting guidelines present a barrier to rehabilitation of affordable housing.

Section 811 of P.L. 106-569 was intended to allow Section 202 sponsors to build equity in the projects which could be used to refinance at lower interest rates. When the refinancing results in lower Section 8 (or other rental assistance) to the sponsor, at least 50 percent of those annual savings were to be made available for services to residents or improvements to the facility. Such improvements could include rehabilitation, modernization, or retrofitting of structures, common areas, or individual dwelling units. The savings could also be used for construction of an addition or other facility in the project.

Unfortunately, by underwriting according to the lesser of current Section 8 contract rents or comparable unassisted market rents, we believe HUD is creating a barrier for many, if not most, Section 202 projects from participating in the program. A substantial number of deals will be unworkable with these underwriting requirements. We recommend underwriting with FHA mortgage insurance at the existing rents. We believe underwriting at existing rents would present no risk to the insurance fund because Section 612(h) of P.L. 107-116 exempts these properties from Mark-to-Market, and the rents will not go down.

- **General Observations Regarding Missed Deadlines in the Supportive Housing for the Elderly and Persons with Disabilities Programs which Result in Delays (24 CFR 891)**

Another issue which members believe imposes a barrier to affordable housing production concerns instances in which HUD does not comply with its own deadlines, especially in the Section 202 program. Once again, the problem is related to the implementation of the regulations more than the regulations themselves. Missed deadlines during the processing phase often result in construction delays, and ultimately increase the time it takes for this housing to become available for seniors in need of assistance.

There is rarely a "perfect" development deal. Members report that delays frequently occur because the field offices often refer decision making to Headquarters for unforeseen problems or anomalies that arise. The field offices do not seem to feel that they have authority to make decisions about unforeseen situations that arise, even though uncertainty in development is the rule rather than the exception.

Some specific examples of missed deadlines and unnecessary delays include: field offices often exceed the 10 day deadline in which processing is supposed to begin; construction starts are often delayed because developers' requests are not acted upon at HUD, and once the award happens, HUD appraisals exceed the requirements of conventional lenders; and HUD fails to act on requests to proceed to closing in a timely manner. This last factor is important because sponsors can lose their MCI because the Department did not act on the request within the required 6 month timeframe between opening the building and going to final closing.

We urge the Department to place a much higher priority on meeting programmatic deadlines and to empower field staff to make time-sensitive decisions.

Section 8 Voucher Program

While we recognize that the primary emphasis of this regulatory barrier removal initiative is focused on development issues, we also respectfully submit for the Department's consideration barriers to private sector participation in the Section 8 voucher program. We believe it is critical to meet the housing needs of low- and moderate-income families. Improving the Section 8 voucher program is a central part of meeting those needs. We urge Congress and HUD, to enact reforms to the existing Section 8 program that will encourage apartment owner participation and, in turn, increase housing available to voucher holders.

Professional apartment owners, in partnership with the current voucher administrators, have made great strides in helping low-income families find quality affordable rental housing through the Section 8 program – a partnership that helps the community as a whole. We wholeheartedly support the Section 8 program as a means to engage private housing operators in providing affordable rental housing to families who need it. We believe more apartment owners would participate in the program if the costs of renting to voucher residents were more comparable to the costs of serving unsubsidized residents. In other words, the program must be more "transparent" to the market.

We believe that the existing Section 8 program, with the recommended improvements, will make affordable housing available to more Americans. Widespread participation is not always economically feasible in the absence of the noted program reforms which will reduce the sometimes significant costs and burdens imposed on implementation of the program.

We propose the following recommendations to achieve greater private-sector participation in the Section 8 voucher program, and to increase the supply of rental units available to the voucher holders:

- **Funding**

Some assert that the Section 8 appropriations structure should be reworked and reduced. Historically, many criticized the Section 8 appropriations structure because too much funding remained unused each year. To be sure, appropriations were once based upon the erroneous assumption that every authorized voucher would be utilized for an entire fiscal year and funds were routinely recaptured and rescinded. Those returned funds reduced annual appropriations to the amounts actually used. Effective in 2003, Congress enacted changes to minimize recaptures. Moreover, national utilization rates have risen to nearly 96 percent. That success should be recognized and the process supported. We support increased utilization rates, and believe that the existing successful appropriations structure is working.

We have had considerable concerns regarding the complexity and workability of the proposed state-level funding structure described in the Administration's FY 2004 budget proposal, which included a two-year plan to turn the Section 8 voucher program into a state-run block grant program.

- **Inspections**

Under current law, before an apartment is eligible for lease to a Section 8 voucher holder, the administering Public Housing Authority (PHA) must inspect that unit for compliance with HUD-prescribed Housing Quality Standards (HQS). Unit-by-unit inspections cause intolerable leasing delays and do not necessarily satisfy HUD's objective of protecting residents and assuring owner compliance with the Department's health and safety criteria. Unit-by-unit inspections delay resident occupancy even if the PHA conducts its inspection within the required time frame, and some apartment owners report delays of 30 days or longer. The apartment industry relies on seamless turnover to meet its overhead costs. The financial implications of such delays are sufficient to deter them from participating in the program.

We propose speeding up the move-in process by allowing PHAs to conduct individual unit inspections within 60 days after the resident moves in and payment commences. PHAs could also conduct building-wide, rather than unit-by-unit, inspections in certain cases and rely upon recent past individual inspections. Alternatively, PHAs could initially inspect a representative sample of units in order to "certify" that the building is eligible. Thereafter, periodic inspections would assure that the property remains compliant with program rules. This approach would reward well-managed properties, allow PHAs to focus their scarce resources elsewhere, and maintain resident safety.

- **Payment System**

PHAs are required to make prompt subsidy payments to apartment owners. However, subsidy payments are sometimes untimely either because of antiquated systems or HUD processing delays. Just as owners would not regularly accept late rental payments from conventional residents, they should not be asked to accept late subsidy payments. We commend HUD for authorizing a $75 late fee charged to PHAs that do not make timely payments due to accounting inefficiencies. We urge HUD to continue their efforts to provide timely payments to owners by ensuring that PHAs have the ability to make automated electronic fund transfers to owners. Some PHAs already use automated funds transfer systems but it would be helpful if HUD would provide technical assistance, funding, and other support to ensure that all PHAs have the capacity to utilize automated payment systems. HUD also should establish incentives to facilitate timely payments to owners.

- **Fair Market Rents and Payment Standard**

Fair Market Rents (FMRs), set annually by HUD for each metropolitan area, must be set high enough to encourage owner participation and, in turn, create a sufficient supply of apartments and choice for voucher holders. We thank HUD for raising the current FMR level to the 50th percentile in 39 high-cost areas, but that level is insufficient in certain areas with extremely high-cost sub-markets.

We urge HUD to enact a more efficient, streamlined process for PHAs to apply for higher FMRs that are more reflective of submarket rents. The current payment standard, the maximum amount that the housing agency will pay toward a family's rent minus 30 percent of the tenant's adjusted income, is generally capped at 110 percent of an area's FMR. If the area's FMR does not accurately reflect local market conditions, and the payment standard is not sufficiently high to allow owners to earn sufficient income to meet costs, owners will not participate in the program. Low FMRs are a primary reason many apartment owners do not participate in the voucher program. We urge program changes that will allow PHAs to raise the payment standard to 120 percent of FMR without HUD approval, and afford PHAs increased flexibility to request higher payment standards when necessary to reflect actual market conditions in a particular location.

<u>Notice of Guidance to Federal Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons (Notice).</u> [Docket No. FR-4878-N-01]

On December 19, 2003, HUD published in the Federal Register the *Notice of Guidance to Federal Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (Notice). Title VI of the Civil Rights Act of 1964 mandates that recipients of federal financial assistance ensure meaningful access to their programs and activities by persons with limited English proficiency (LEP). Executive Order 13166, as referenced in the Notice, directs each federal agency "to publish guidance for its respective recipients clarifying that obligation." Further, the Department of Justice has set forth federal-wide compliance standards that recipients must follow to ensure that the programs and activities they normally provide in English are accessible to LEP persons.

In this Notice, HUD states that it is seeking comments on the nature, scope and appropriateness of examples. However, the Notice also states that while this is policy guidance, not a regulation, "the same analytical framework outlined in the Notice represents the criteria HUD *will* use in evaluating whether a recipient is in compliance with Title VI and Title VI regulations." The implication is that, though this Notice will allow comments, it is already considered to be in effect. What this Notice does not state, but the Executive Order 13166 specifically requires, is that "… agencies shall ensure that stakeholders, such as LEP persons and their representative organizations, recipients, and other appropriate individuals or entities, have an adequate opportunity to provide input." Yet, stakeholder comment was not sought in the development of this Notice.

On January 20, 2004, several national housing provider trade associations, representing both public and multifamily assisted housing, came together to submit joint commentary as evidence of our unified concerns regarding this Notice. We highlight this issue and recommend HUD review the document submitted. We believe the costs associated with this guidance will pose a substantial barrier to participating in HUD's affordable housing programs. We are concerned that the costs and potential liability, as detailed in the industry comments, will discourage otherwise willing affordable housing providers to participate in HUD programs, and may cause current providers to opt-out.

<u>Conclusion</u>

Thank you again for the opportunity to comment on HUD's Initiative on Removal of Regulatory Barriers. We look forward to continuing a dialogue with the Department regarding ways to increase the supply of affordable multifamily housing. Once again, we would like to commend HUD for undertaking this review of its regulations.

For additional information about the issues raised in these comments, please feel free to contact the following staff members: Michelle Kitchen (NAHMA) at 703-683-8630 and Lisa Blackwell (NMHC / NAA) at 202-302-7859.

Sincerely,

American Association of Homes and Services for the Aging
National Affordable Housing Management Association
National Apartment Association
National Leased Housing Association
National Multi Housing Council